Electro-Voice, Inc. *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO. Case 25–CA–23319

June 5, 1996

ORDER DENYING MOTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On March 29, 1996, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] Thereafter, on April 16, 1996, the Respondent filed a Motion for Reconsideration and Reopening of Record, requesting that the Board reconsider its Decision and Order, and moving to reopen the record for additional evidence on the subject of the propriety of the bargaining order. On April 19, 1996, the Respondent filed a Supplement to Motion for Reconsideration and Reopening of Record.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In its motion for reconsideration, the Respondent specifically requests that the Board reconsider its findings that the Respondent violated Section 8(a)(1) by creating the impression that employees' union activities were under surveillance and by making statements to employees that membership in or support for the Union would be futile; Section 8(a)(3) by changing its absenteeism policy so that it could discharge employees in retaliation for their union activities and in order to discourage other employees from engaging in union or protected concerted activities; Section 8(a)(5) by changing its absenteeism policy at a time when it was obligated to bargain with the Union; and that the Board reconsider its issuance of a remedial bargaining order. The Respondent's motion further requests that the Board reconsider all of the remaining unfair labor practice conduct found by the administrative law judge that the Board adopted without analysis. The Respondent contends generally that the Board materially erred ''with respect to its findings of fact, conclusions of law, and issuance of a bargaining order.''

Having duly considered the matter, we deny the Respondent's motion for reconsideration as lacking in merit and as raising only issues previously considered and rejected by the Board.

By its motion to reopen the record, as supplemented, the Respondent seeks to introduce evidence concerning employee turnover since the date of the unfair labor practices, whether additional unfair labor practices have been alleged or committed since the original charge was filed, and employees' union activities since the unfair labor practices occurred. The Respondent argues that such evidence is relevant to the issue of whether a bargaining order is appropriate, relying on *HarperCollins Publishers, Inc. v. NLRB*, 79 F.3d 1324 (2d Cir. 1996), vacating in part 317 NLRB 168 (1995).

Specifically, the Respondent asserts that of the 32 employees currently employed by the Respondent, only 11 were employed by the Respondent in June 1994, and only 6 had signed union cards in June 1994. The Respondent contends that the Union no longer represents a majority of the Respondent's employees and, further, that it has not committed, nor has the Union alleged, any additional unfair labor practices since the original charge was filed. The Respondent asserts that union organizing efforts continued after the date of the unfair labor practices, union support remained high, employees continued to attend union meetings, and the atmosphere of free choice has not been chilled by any of the unfair labor practices. Finally, the Respondent points out that nearly 2 years have passed since the unfair labor practices occurred.

We find initially that the Respondent's motion to reopen the record is deficient because it fails to state, as required by Section 102.48(d)(1) of the Board's Rules and Regulations, ''why [the evidence] was not presented previously.'' With respect to events occurring between the time of the unfair labor practices and the close of the hearing, we note that the evidence regarding these events could have been adduced at the hearing. Although the evidence concerning posthearing employee turnover, absence of unfair labor practice charges, and subsequent employee union activity by definition was unavailable at the hearing, the Respondent has failed to state why it neglected to offer the evidence until after the Board issued its decision. The hearing in this case closed January 19, 1995; the judge's decision issued June 5, 1995; and the Board's Decision and Order issued March 29, 1996. Clearly, the Respondent was in possession of this evidence at least during the period when the case was pending before the Board on exceptions. The Respondent has offered no explanation whatsoever for its failure to raise any mitigating circumstances until April 16, 1996—more than 10 months after the judge's decision issued, more than a year after the hearing closed, and almost 2 years after the unfair labor practices. Accordingly, we find that this motion was untimely made.

Section 102.48(d)(1) of the Board's Rules and Regulations further provides that a motion to reopen the record must state why the evidence, if adduced and credited, ''would require a different result.'' The Respondent's motion does not comply with this provision. Although the Respondent asserts that evidence of employee turnover and absence of subsequent unfair

[1] 320 NLRB 1094 (1996).

[2] By its motion and supplement, the Respondent has requested oral argument. The request is denied as the record, including the Decision and Order, and the motion and supplement adequately present the issues and positions of the parties.

labor practices was found relevant in *HarperCollins Publishers, Inc. v. NLRB*, supra, the Respondent nonetheless ignores the clear weight of Board law.

The Board has consistently assessed whether a *Gissel*[3] bargaining order remedy is warranted as of the time of the respondent's unfair labor practices; the Board has not considered subsequent employee turnover or the absence of subsequent unfair labor practices in this context. See *Highland Plastics, Inc*., 256 NLRB 146, 147 (1981). To delete a *Gissel* bargaining order on this basis would reward, rather than deter, an employer who engaged in unlawful conduct during an organizational campaign. Ibid. Accordingly, we find that the additional evidence the Respondent seeks to introduce will not require a different result.

Moreover, we disagree with the Respondent that the Second Circuit's decision in *HarperCollins*, supra, would require a different result. *HarperCollins* is distinguishable from this case for several reasons.[4]

In *HarperCollins*, the court held that the Board erred by failing to consider evidence of employee turnover and passage of time since the respondent's unfair labor practices, and by failing to provide a reasoned analysis of the inadequacy of traditional remedies in determining whether a bargaining order was warranted. The respondent in *HarperCollins* moved to reopen the record while the case was still pending before the Board on exceptions. Thus, the *HarperCollins* Board had the opportunity to consider the proffered evidence when it was deciding whether to impose a Gissel order. See *HarperCollins Publishers, Inc*., 317 NLRB 168 (1995). As discussed above, the Respondent here did not even raise the issue of mitigating circumstances until after the Board decision issued. Therefore, even if we agreed that employee turnover and passage of time since the Respondent committed unfair labor practices were relevant considerations in our determination of whether a bargaining order is warranted, the Respondent did not even attempt to make such evidence available to us when we were considering the need for a bargaining order.[5] When we decided to issue a bargaining order in this case, of course, we were aware that almost 2 years had passed since the unlawful conduct had occurred; however, ''passage of time alone is not sufficient 'to indicate that the effects of the Company's ULPs will no longer be felt.''' *HarperCollins Publishers, Inc. v. NLRB*, supra at 1333, quoting *J.L.M., Inc. v. NLRB*, 31 F.3d 79, 85 (2d Cir. 1994).

Additionally, the Board in this case provided an extensive analysis of the inadequacy of traditional remedies in *Electro-Voice*, 320 NLRB 1094 (1996). In particular, the Board analyzed the nature of the violations, the swiftness and magnitude of the Respondent's retaliation, the long-lasting effects of the Respondent's conduct on employees' free choice, the involvement of the Respondent's high-ranking officials in committing virtually every unfair labor practice found, and the intensity of the Respondent's course of conduct.

In sum, ''[t]here must be an end to litigation in Labor Board cases.'' *L'Eggs Products v. NLRB*, 619 F.2d 1337, 1353 (9th Cir. 1980). We do not believe that the *HarperCollins* court contemplated that an untimely request for further hearing would be sufficient to warrant prolonging the administrative proceeding in view of the prejudicial effects of delay.[6] Accordingly, we shall deny the Respondent's motion to reopen the record.[7]

It is ordered that the Respondent's Motion for Reconsideration and Reopening of Record is denied.

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[3] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

[4] The Respondent also contends that *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156 (7th Cir. 1990), requires a different result. *Montgomery Ward* is distinguishable from the situation presented here because, in that case, the court concluded that the Board abused its discretion by imposing a *Gissel* bargaining order 8 years after the unfair labor practice charges were filed and without sufficient analysis of the adequacy of traditional remedies. As discussed below, the Board in this case issued its decision less than 2 years after the original charge was filed and provided extensive analysis of the inadequacy of traditional remedies.

[5] As the Court of Appeals for the District of Columbia Circuit made clear in its recent decision in *Blockbuster Pavilion v. NLRB*, 82 F.3d 1074 (D.C. Cir. 1996), the burden is on a respondent to bring to the Board's attention evidence of changed circumstances that would mitigate the need for a bargaining order. Thus, the court stated in *Blockbuster* that before issuing a *Gissel* order, ''the Board has no affirmative duty to inquire whether employee turnover or the passage of time has attenuated the effects of earlier unfair labor practices.'' 82 F.3d at 1080. at 10. On the facts of *Blockbuster*, the court found that the company's motion to reopen the record was timely because it was filed ''with reasonable promptness following the issuance of the ALJ's recommendation of a bargaining order.'' Supra. As discussed above, the same cannot be said of the Respondent's motion here.

[6] See the discussion in *Conair Corp. v. NLRB*, 721 F.2d 1355, 1388–1389 fn. 1 (D.C. Cir. 1983) (Wald, J., dissenting), cited with approval in *Blockbuster*, supra, 82 F.3d at 1080.

[7] In denying the motion, Member Cohen relies solely on its untimeliness. See *HarperCollins*, supra at fn. 2.